



INDEX

	Page
Opinions below.....	1
Jurisdiction.....	2
Question presented.....	2
Statutes involved.....	3
Statement.....	3
Argument.....	7
Conclusion.....	13
Appendix.....	14

CITATIONS

Cases :

<i>Atton R. Co. v. United States</i> , 315 U. S. 15.....	13
<i>Chicago, St. Paul, M. & O. Ry. Co. v. United States</i> , 322 U. S. 1.....	13
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U. S. 591.....	10, 11
<i>Panhandle Eastern Pipeline Co. v. Federal Trade Commission</i> , No. 296, this Term, decided April 2, 1945.....	8
<i>United States v. Carolina Carriers Corp.</i> , 315 U. S. 475.....	13
<i>United States v. Maher</i> , 307 U. S. 148.....	13

Statutes :

Motor Carrier Act of 1935, Secs. 206 and 207 (49 U. S. C. 306, 307).....	13
Natural Gas Act of 1938, c. 550, 52 Stat. 821 (15 U. S. C. 717 et seq.), as amended by the Act of February 7, 1942 :	
Section 1.....	11, 14
Section 4.....	11
Section 5.....	11
Section 7.....	7, 8, 14
Section 19.....	8, 16

Miscellaneous :

Federal Power Commission, 1940 Annual Report.....	10
H. Rep. No. 1290, 77th Cong., 1st Sess.....	10, 13



In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1310

DEPARTMENT OF CONSERVATION OF THE STATE OF
LOUISIANA AND THE PUBLIC SERVICE COMMISSION
OF THE STATE OF LOUISIANA, PETITIONERS

v.

FEDERAL POWER COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT*

**BRIEF FOR THE FEDERAL POWER COMMISSION
IN OPPOSITION**

OPINIONS BELOW

The opinion of the Federal Power Commission of November 21, 1944 (R. 18-35; C. R. 9-29) ¹ is reported in 56 P. U. R. (NS) 271. The opinion of the Circuit Court of Appeals (R. 59-67) is not yet reported.

¹ In this brief, "R." is used to indicate the record printed by the Clerk of this Court; "C. R." is used to indicate the record printed as an appendix to the Commission's brief below, and filed by petitioner as part of the printed record herein.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 31, 1945 (R. 67). A petition for rehearing (R. 68-80) was denied on April 18, 1945 (R. 81). The petition for a writ of certiorari was filed on May 25, 1945. Jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Federal Power Commission, after hearings, issued to an applicant, under Section 7 (e) of the Natural Gas Act, certificates of public convenience and necessity authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas. Petitioner, representing the State of Louisiana from which the gas was to be taken, contended before the Commission that the issuance of the certificates would violate "sound conservation practices" in view of the rapid depletion of Louisiana natural gas reserves and the proposed use of a major portion of the gas for "boiler fuel," alleged to be an inferior and uneconomic use. The question presented is whether the Commission, having considered this contention, was required as a matter of law to deny the requested certificates.

STATUTES INVOLVED

The applicable portions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 14-18.

STATEMENT

The order here under review issued, pursuant to Section 7 (e) of the Natural Gas Act, certificates of public convenience and necessity to the Memphis Natural Gas Company ("Applicant") authorizing the construction and operation of specified facilities for the interstate transportation and sale of natural gas, subject to the Commission's jurisdiction (R. 35-37).

Applicant, a Delaware corporation having its principal place of business in Memphis, Tennessee, owns and operates an 18-inch natural gas pipe line which extends from the Monroe gas field in Louisiana, through Arkansas and Mississippi, to the City of Memphis, Tennessee. The natural gas transported through this pipe line is purchased by the Applicant from the Southwest Gas Producing Company, Inc., and the United Gas Pipeline Company at Applicant's Guthrie compressor station in Ouachita Parish, Louisiana, and such gas is sold by the Applicant to one direct sale and five wholesale customers, the principal one of the latter being the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee. (C. R. 1-3; R. 26-27.)

On January 31, 1944, the Applicant filed an application with the Federal Power Commission, under Section 7 (c) of the Natural Gas Act, for a certificate of public convenience and necessity to authorize the construction and operation of three 18-inch pipe lines, aggregating some 61½ miles in length, to parallel the unlooped portions of its existing pipe lines (C. R. 2; R. 18). A public hearing was held thereon before the Commission's Trial Examiner between March 15 and April 17, 1944 (C. R. 2), in which leave to intervene was granted to petitioners and others (C. R. 1).² On June 10, 1944, the Commission entered an order finding, *inter alia*, that:

(3) In view of the limited natural gas reserves shown by the record to be available to Applicant, their present rapid rate of depletion, and the effect of excessive rates of withdrawal on the ultimate recovery of gas therefrom, it is necessary and appropriate in the public interest that such natural gas resources be conserved insofar as possible for domestic, commercial and superior industrial uses.

²The State of Tennessee, the Memphis Light, Gas and Water Division of the City of Memphis, Tennessee, and the West Tennessee Gas Company of Jackson, Tennessee, intervened in support of the application. The National Coal Association, the United Mine Workers of America, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen and Enginemen, and the Switchmen's Union of North America, intervened in opposition to the application (C. R. 1; R. 30).

(4) The record does not contain a sufficient showing that the proposed construction and operation are or will be required by the present or future convenience and necessity.

and accordingly ordered the application dismissed "without prejudice" (C. R. 8-9). The Applicant thereupon filed an application for rehearing under Section 19 (a) of the Act, which the Commission granted by order of August 1, 1944 (R. 18).

In the meantime, on May 20, 1944, the Applicant had filed another application for a certificate of public convenience and necessity to authorize its construction and operation of a 20-inch natural gas pipe line, approximately 49½ miles in length, extending from the North Lisbon gas field in Claiborne Parish, Louisiana, to Applicant's Guthrie compressor station in the Monroe field (R. 19).

Upon Applicant's request, the Commission consolidated the hearing on the second application with the rehearing on the first application (R. 19). Public hearings in the consolidated proceedings were held before the Commission's Trial Examiner between September 7 and October 5, 1944, and thereafter oral argument was had before the Commission *en banc* on October 16, 1944 (R. 19).³

³ In addition to the intervenors who had participated in the previous hearing (fn. 2, *supra*), leave to intervene was also granted to the State of Mississippi, the Oil and Gas Board of the State of Mississippi, the Railroad Commission of the State of Texas, the Corporation Commission of the

On November 21, 1944, the Commission issued an opinion which reviewed the extensive evidence of record and stated, *inter alia*, that it was "apparent" from "the record made at the former hearing, that the natural-gas supplies available to Applicant at that time were inadequate to warrant the enlargement of its main-line capacity by the installation of the proposed loop-line facilities," but that "the evidence presented at the rehearing shows that Applicant recently made further arrangements to secure substantial additional gas supplies" (R. 23-24). By such opinion and the accompanying order of November 21, 1944, the Commission found that the construction of the proposed facilities "[is] and will be required by the present and future public convenience and necessity," and that the Applicant "is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Natural Gas Act, as amended, and the requirements, rules and regulations of the Commission thereunder" (R. 35). The Commission accordingly issued certificates of public convenience and necessity authorizing Applicant's construction and operation of the proposed facilities, upon the condition, among others, that such facilities "shall not be used for the transportation or sale of natural gas to any new customers of

State of Kansas, the Department of Public Utilities of the State of Arkansas, and the Independent Natural Gas Association of America (R. 29-30).

either Applicant or United Gas Pipe Line Company except upon specific authorization by this Commission" (R. 35-37).

The petitioners' application for a rehearing and stay of the Commission's order (R. 10-16) was denied by order of December 12, 1944 (R. 17). Petitioners thereafter filed a petition for review, under Section 19 (b) of the Natural Gas Act, in the Circuit Court of Appeals for the Fifth Circuit (R. 2-8) which handed down its opinion on March 31, 1945 (R. 59-67), and, on the same day, entered its judgment (R. 67), affirming the Commission's order. A petition for rehearing (R. 68-80) was denied by that court on April 18, 1945 (R. 81).

ARGUMENT

Section 7 (e) of the Natural Gas Act, under which the Applicant sought certificates of public convenience and necessity to authorize the construction and operation of specified facilities for the interstate transportation and sale of natural gas, provides that the Federal Power Commission "shall" issue such certificates:

to any qualified applicant therefor, * * *
if it is found that the applicant is able and
willing properly to do the acts and to per-
form the service proposed * * *, and
that the proposed service, sale, opera-
tion, construction, extension, or acquisi-
tion, * * * is or will be required by

the present or future public convenience and necessity * * *.

There is no dispute with respect to the Commission's finding that the Memphis Natural Gas Company was a "qualified applicant" within the meaning of Section 7 (e) of the Act.⁴ On the basis of detailed subsidiary findings (R. 1835), the Commission found that the "Applicant is able and willing properly to do the acts and perform the service proposed," and that the construction and operation of the proposed facilities are and will be required by the present and future public convenience and necessity (R. 35)." The petition herein seeks to raise twenty-eight questions (Pet. 5-18) many of which are repetitious. In the light of this fact and of Section 19 (1) of the Act prohibiting any party from raising any objection on review of an order of the Commission "unless such objection shall have been urged before the Commission in the application for rehearing" (see *Panhandle Eastern Pipeline Co. v. Federal Power Commission*, No. 296, this Term, decided April 2, 1945), we submit that the only questions of substance now before this Court are those relating to "conservation" raised by peti-

⁴ Inasmuch as the Applicant was *bona fide* engaged in the interstate transportation and sale of natural gas for resale through its present facilities on February 7, 1942, the effective date of the amendment to Section 7 (c) of the Act, it applied for and was granted a "grandfather" certificate of public convenience and necessity authorizing a continuation of such operations (R. 21, fn. 2).

tioners before the Commission in their petition for rehearing, namely, (1) that the certificates will not further the public convenience and necessity because "if the proposed facilities were not constructed, curtailments would need to be made only in service to consumers using gas for boiler fuel purposes" (R. 11); and (2) that the construction and operation of the proposed pipe line facilities will contravene "sound conservation practices." (R. 10-16).⁵

Petitioners' contention—that the proposed pipe line facilities contravene considerations of "sound conservation practices" in the light of the prospective depletion of the limited natural gas reserves of the State of Louisiana which has neither coal

⁵ In its application for rehearing before the Commission (R. 11), and in its instant petition (Pet. 40), petitioners contend that the Applicant failed to show adequate gas reserves available "under firm contracts" to justify construction of the proposed facilities. The Commission made detailed findings on this matter, giving careful consideration to the Applicant's ability to obtain the natural gas reserves necessary to justify the proposed facilities (R. 22-25). As required by the Commission's order (R. 36) "formal contracts" for the supplying of the natural gas have now been filed with the Commission and the question is now academic. Nor is there merit to petitioners' contention (Question 21, Pet. 14-15) that the certificate of convenience and necessity for the construction of a 20-inch pipe line between Lisbon and Guthrie, Louisiana, is null and void because the construction of the proposed line would increase the facilities of United Gas Pipeline Company without that company's having made application therefor. United will not construct or operate any portion of the proposed facilities within the meaning of Section 7 (c) of the Act.

nor water power, and the use of such gas for industrial purposes in Tennessee where coal supplies are ample—furnishes no basis for reversal of the Commission's order. While considerations of conservation pose difficult questions of national policy which are pressing for solution,⁶ the instant case does not involve the broad question whether the Commission would have authority to deny applications for certificates of convenience and necessity because of these considerations, but rather, whether the Commission was compelled to deny the certificates because of such considerations. We submit that while "considerations of conservation are material to the issuance of certificates of public convenience and necessity" (*Federal*

⁶ In its 1940 Annual Report to Congress, the Commission adverted to the growing importance of the conservation and proper utilization of natural gas and to the possible need for further investigation and additional legislation (R. 32). Thereafter, the House Committee on Interstate and Foreign Commerce, in its Report on H. R. 5249, a bill to amend Section 7 of the Natural Gas Act (H. Rep. No. 1290, 77th Cong., 1st Sess., pp. 4-5), deleted certain portions of the proposed bill, stating that: "The increasingly important problems raised by the desire of several States to regulate the use of the natural gas produced therein in the interest of consumers within such States, as against the Federal power to regulate interstate commerce in the interest of both interstate and intrastate consumers, are deemed by the committee to warrant further intensive study and probably a more detailed and comprehensive plan for the handling thereof than that which would have been provided by the stricken subsection." The Commission responded to this suggestion by instituting, on September 22, 1944 (Docket No. G-580), a comprehensive investigation of the entire problem (R. 33).

Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 612), the Act does not, as the court below stated, "make such matters determinative" (R. 65).

As held below (R. 66), the "guiding language" of the Natural Gas Act does not support petitioners' assertion that "the commission, as a matter of law, could not grant the certificates" because of considerations of conservation, or the end uses to which the gas may be put.⁷ Moreover, as stated in the Commission opinion, "This proceeding does not involve the construction of a pipeline to provide service to new market areas," but "the proposed facilities are required for the rendition of adequate service to Applicant's present customers in its existing markets," the "total additional gas to be sold by Applicant constitutes only about 1.3 per cent of the total natural-gas production of Louisiana marketed in the year

⁷ Under Section 1 (b) of the Act, the Commission's jurisdiction does not include the regulation of the "production and gathering of natural gas," and Section 11 merely directs the Commission to assemble information and report to Congress upon proposed or existing State compacts dealing with the "conservation" of natural gas. Moreover, the Commission has no jurisdiction to regulate "the local distribution of natural gas" (Sec. 1 (b)). Its rate-making authority is limited to interstate sales for resale and does not include the regulation of rates charged for natural gas sold directly to industrial consumers (Sec. 1 (b)), and its authority to suspend a proposed increase in existing interstate wholesale rates does not extend to the "sale of natural gas for resale for industrial use only" (Sec. 4 (e)). See also Sec. 5 (a).

1942;" and "the agreement between Applicant and United contemplates that within a few years a sizable proportion of Applicant's additional gas supplies will come from Texas" (R. 33-34). The Commission further stated that it was "not unsympathetic with the effort of the producing State of Louisiana to protect and conserve its natural gas resources," but that it was "apparent that denial of Applicant's request for these certificates will not afford the State of Louisiana a satisfactory solution of the problem posed by it" (R. 34). With these considerations in mind, the Commission found the certificates to be "required by the present and future public convenience and necessity" (R. 35), expressly prohibiting their use, however, "for the transportation or sale of natural gas to any new customers of either Applicant or United * * * except upon specific authorization" by the Commission (R. 36).

We accordingly submit that the Commission was not required under the Act to deny the requested certificates because of the conservation considerations urged by petitioners. After considering petitioners' contention, the Commission, in the exercise of its administrative discretion, found that the issuance of such certificates was required by the "present" and "future public convenience and necessity." This determination under Section 7 (e) of the Natural Gas Act, as under its prototype, Secs. 206 and 207 (a) of the

Motor Carrier Act of 1935, 49 U. S. C. Secs. 306, 307 (See H. Rep. 1290, 77th Cong., 1st Sess., p. 2), is a "function * * * peculiarly * * * for the Commission, not the courts" (*Alton R. Co. v. United States*, 315 U. S. 15, 23; and see also *Chicago, St. Paul, M. & O. Ry. Co. v. United States*, 322 U. S. 1, 2-3; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 480; *United States v. Maher*, 307 U. S. 148, 154); and the findings underlying it are not now open to question in this Court.

CONCLUSION

The decision below is correct and there is no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

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